

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION**

JOHN M. PITMAN, III

and

PENINSULA PLASTIC SURGERY CENTER, LTD

Plaintiffs,

V.

XCENTRIC VENTURES, LLC

and

EDWARD MAGEDSON

and

DARREN M. MEADE

and

TRACEY A. RICHTER

and

ANNA RICHTER

and

BERT PITMAN (a/k/a BERT RICHTER)

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION TO STRIKE AFFIDAVIT OF EDWARD MAGEDSON

Plaintiffs, John M. Pitman (“Pitman”) and Peninsula Plastic Surgery Center, LTD.

(“PPS”) (collectively the “Plaintiffs”), by counsel, submit the following Memorandum in Support of Plaintiffs’ Motion to Strike Affidavit of Edward Magedson. (“Magedson”) which was filed

with Defendant Xcentric Ventures, LLC's ("Xcentric") Notice of Removal. In support thereof, Plaintiffs state as follows:

PRELIMINARY STATEMENT

The affidavit of Magedson is filled with declarations based solely on the statements of his friend and Co-Defendant Anna Richter. These unsupported statements are hearsay and allegedly detail the activities of Ms. Richter's grandson and Co-Defendant Bert Pitman. Since the Declaration is based solely on inadmissible hearsay, it should be stricken.

ARGUMENT & AUTHORITIES

I. The Affidavit Contains Inadmissible Hearsay and it Otherwise Defective in Violation of Well Established Precedent Governing the Admissibility of Affidavits in Federal Court Proceedings.

It is well established that federal courts have the “authority to look beyond the pleadings and consider summary-judgment-type evidence, such as the affidavits and the depositions accompanying either a notice of removal or a motion to remand.” *See Linnin v. Michielsens*, 372 F.Supp.2d 811, 819 (E.D. Va. 2005) (*quoting* Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 3d § 3641); *See also* Fed. R. Civ. P 43(c). In evaluating affidavits, federal courts have consistently held that the sworn statements must be based personal knowledge and must set out facts that would be admissible in evidence. *See Greensboro Professional Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir.1995) (inadmissible hearsay in depositions and affidavits may not support or oppose summary judgment motion; *Versatile v. Johnson*, 2011 WL 1167440 (E.D. Va 2011) (granting motion to strike affidavits containing inadmissible hearsay).

The Magedson affidavit is based entirely upon inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testify at the trial or hearing, offered in

evidence to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). The Federal Rules of Evidence further provide that: “Hearsay is not admissible except as provided by these rules . . .” Fed. R. Evid. 802. The affidavit is not based upon Magedson’s personal knowledge, but instead only offers the statements of Anna Richter and other unknown sources.

All the operative paragraphs of the Magedson affidavit contain hearsay. At the outset, the affidavit states that Magedson has “spoken with codefendant Anna Richter about the domicile of codefendant Bert Pitman.” (Magedson Aff. ¶ 2). The affidavit then outlines what Anna Richter told Magedson about Bert Pitman. Paragraph three of the affidavit offers unadulterated hearsay and relays the out-of-court statements of Anna Richter through Magedson. By way of Magedson, Anna Richter claims that “contrary to the allegations of the complaint in the referenced action, Mr. [Bert] Pitman resides in Iowa.” (Magedson Aff. ¶ 3). This is hearsay.

Paragraph four also contains inadmissible hearsay and provides that “Ms. Richter *reported* that Mr. [Bert] Pitman has an Iowa driver’s license and a full-time job in Iowa. (Magedson Aff. ¶ 4) (emphasis added). Again, this is hearsay as Magedson is only offering the “reports” of Anna Richter- who is not the affiant.

Paragraphs five and six also contain inadmissible hearsay- this time from unknown sources. Magedson claims that he is “further informed” from a hidden source which is not verifiable or discernable from the affidavit. Magedson attaches no documents to the affidavit to support his claims nor does he state where or how he learned the information he sets forth in paragraphs five and six.

The entire affidavit should be struck and disregarded by this Court as it offers no creditable or admissible evidence. Instead, the affidavit merely outlines out-of-court statements in an

attempt to improperly remove this action to federal court. Xcentric's attempts to secure jurisdiction in this Court based upon the defective affidavit should be rejected by this Court.

II. The Court Should Strike the Improper and Unsupported Portions of Xcentric's Notice of Removal.

In support of its Notice of Removal, Xcentric relies on the Magedson affidavit. Plaintiffs have properly objected to Xcentric's reliance on the Magedson affidavit. For the reasons stated here, the Court should strike and disregard the sections of Xcentric's Notice of Removal relying on or referencing the Magedson affidavit.

CONCLUSION

For the foregoing reasons, the Plaintiff's respectfully requests that this Court grant its Motion to Strike the Affidavit of Edward Magedson and disregard its contents in ruling on Xcentric's Notice of Removal.

Respectfully submitted,

JOHN M. PITMAN, III, and
PENINSULA PLASTIC SURGERY
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By: /s/ Aaron Balla Houchens
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will mail the document by U.S. mail to the following non-filing users:

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